

DAN SOLECKI, MARYLOU TEEL
ALFRED COOK

IBLA 2001-258, 2001-259

Decided July 21, 2004

Appeal from a decision of the Northern Field Office (Alaska), Bureau of Land Management, issuing an Occupancy Non-Concurrence and Cessation Order under 43 CFR Subpart 3715. FF092132.

Affirmed as modified in part; set aside and remanded in part.

1. Mining Claims: Surface Uses--Surface Resources Act: Occupancy

The Surface Resources Act, 30 U.S.C. § 612(a) (2000), bars surface use of an unpatented claim located under the mining laws for any purpose other than prospecting, mining, or processing operations and uses “reasonably incident thereto.” A mining claimant has no right to use or occupy the surface of a mining claim unless the activity constituting the reason for the use or occupancy is reasonably incident to mining-related operations. The fact that a mining claimant’s use of a mining claim constitutes “casual use,” however, does not by itself exclude all types of “occupancy” under the terms of 43 CFR Subpart 3715.

2. Mining Claims: Surface Uses--Surface Resources Act: Occupancy

In order to justify an occupancy on a mining claim, the miner’s activities must comply with all of the requirements of 43 CFR 3715.2 and meet at least one standard set forth in 43 CFR 3715.2-1. To issue a cessation order, BLM must determine whether a miner’s actual activities on a mining claim meet the standards set forth in those two rules. Where the record demonstrates that an appellant’s activities do not meet the standards of 43 CFR 3715.2, BLM’s conclusion that an occupancy is not permitted will be affirmed on that ground.

APPEARANCES: Dan Solecki, Shererville, Indiana, Marylou Teel, Fairbanks, Alaska, and Alfred Cook, Central, Alaska, pro sese; Keith H. Woodward and Bob Booth, Northern Field Office, Fairbanks, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Dan Solecki, Alfred Cook, and Marylou Teel, collectively Gold Rim Associates (GRA), appeal a March 28, 2001, Occupancy Non-Concurrence and Cessation Order issued by the Northern Field Office (Alaska), Bureau of Land Management (BLM), informing them that their occupancy of the Gold Fork # 17 Association mining claim (FF063387) was not in compliance with regulations governing the use and occupancy of mining claims at 43 CFR Subpart 3715. The Cessation Order ordered Solecki, Cook, and Teel to provide a schedule for the removal of two portable buildings (ATCO trailer units) and other personal property prior to April 1, 2002. (Cessation Order at 3-4.)

Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000), provides that mining claims located under the mining laws of the United States “shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.” In 1996, the Department adopted 43 CFR Subpart 3715 to implement that statutory provision and to address the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. 61 FR 37115, 37116 (July 16, 1996). Consistent with the Surface Resources Act, these regulations set forth restrictions on the use and occupancy of public lands open to the operation of the mining laws, limiting activities that will justify an occupancy to those involving prospecting or exploration, mining, or processing operations and uses reasonably incident to such activities. They also establish procedures for beginning occupancy, standards for reasonably incidental activities, prohibited acts, and procedures for inspection and enforcement and for managing existing uses and occupancies.

Karen V. Clausen, 161 IBLA 168, 175-76 (2004); Jay H. Friel, 159 IBLA 150, 156-57 (2003). Unauthorized uses and occupancies on public lands are illegal uses that constitute unnecessary or undue degradation of public lands. 43 CFR 3715.0-5; 61 FR at 37117-18; David J. Timberlin, 158 IBLA 144, 152 (2003).

The rulemaking defined the term occupancy to mean “full or part-time residence on the public lands. It also means activities that involve residence; the * * * presence, or maintenance of temporary or permanent structures that may be used for such purposes * * *. Residence or structures include, but are not limited to, barriers to access, fences, tents, motor homes, trailers, * * * and storage of equipment or supplies.” 43 CFR 3715.0-5. The regulations ensure that “non-mining related habitation” is an activity that is “not reasonably incident.” 43 CFR 3715.6(j).

To justify an occupancy on a mining claim, a claimant must show that both its mining activities and occupancy meet the applicable regulatory standards. See 43 CFR 3715.3-2(b); 43 CFR 3715.6(a). The activities justifying a claimant in “occupy[ing] the public lands under the mining laws for more than 14 calendar days in any 90-day period within a 25-mile radius of the initially occupied site” must: (a) be reasonably incident; (b) constitute substantially regular work; (c) be reasonably calculated to lead to the extraction and beneficiation of minerals; (d) involve observable on-the-ground activity that BLM may verify; and (e) use appropriate equipment that is presently operable. 43 CFR 3715.2; Karen V. Clausen, 161 IBLA at 176. Consistent with the statutory standard, the regulations define “reasonably incident” as “prospecting, mining, or processing operations and uses reasonably incident thereto.” 43 CFR 3715.0-5, citing 30 U.S.C. § 612. The term “includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit, using methods, structures, and equipment appropriate to the geological terrain, mineral deposit, and stage of development and reasonably related activities.” Id.

If a claimant’s activities meet the requirements of 43 CFR 3715.2, he or she may justify an occupancy of the mining claim under Subpart 3715 only if it involves one or more of the following: (a) protecting accessible valuable minerals from theft or loss; (b) protecting from theft or loss equipment that cannot be protected by means other than occupancy; (c) protecting the public from equipment which, if left unattended, creates a hazard; (d) protecting the public from surface uses which, if left unattended, create a hazard to public safety; or (e) “being located in an area so isolated or lacking in physical access as to require the mining claimant, operator, or workers to remain on site in order to work a full shift of a usual and customary length.” 43 CFR 3715.2-1.

Once an occupancy is established, 43 CFR 3715.5 sets specific standards governing that occupancy. These standards require that a “use or occupancy must be reasonably incident. In all uses and occupancies, you must prevent or avoid ‘unnecessary or undue degradation’ of the public lands.” 43 CFR 3715.5(a). Also, claimants may not place permanent structures on the public lands where their exploration or prospecting activities are only “surface activities.” 43 CFR 3715.5(d). Permanent structures are those fixed to the ground by foundations, piers, slabs, poles, or other methods. Such structures also include those not affixed to the ground, but which may only be moved by disassembly or house moving techniques, except that a tent is not a permanent structure. 43 CFR 3715.0-5. Temporary structures only are permitted during the course of exploration or prospecting activities, unless BLM authorizes a longer period. 43 CFR 3715.5(d). As we stated in Jay H. Friel, 159 IBLA at 159, “structures and equipment maintained on site must be related to and commensurate with the operations. John B. Nelson, 158 IBLA [370,] 379 [(2003)];

David E. Pierce, 153 IBLA 348, 358 (2000); Bradshaw Industries, 152 IBLA 57, 63 (2000).”

The regulations provide BLM the power to issue a Cessation Order, halting an occupancy in whole or in part, either temporarily or permanently. 43 CFR 3715.7-1(b); Jay H. Friel, 159 IBLA at 159. BLM may do so where, among other things, “your use or occupancy is not reasonably incident” and does not present a hazard to persons or the environment. 43 CFR 3715.7-1(b)(1)(i). A proper Cessation Order must describe the deficiencies in the occupancy, the corrective action required, the time in which corrective action must be taken, and the length of cessation. 43 CFR 3715.7-1(b)(2).

The Subpart 3715 rules also set forth requirements for the conclusion of an occupancy. Unless BLM specifically provides otherwise, “you must remove all permanent structures, temporary structures, [or] personal property placed on the public lands during authorized use or occupancy under this subpart.” 43 CFR 3715.5-1. Upon concluding an occupancy, claimants have 90 days to remove such property. Id. Any property “you leave on the public lands” beyond this period becomes the property of the United States and miners will be held liable for the cost of removal and disposition. 43 CFR 3715.5-2.

We start by noting that the facts of this case are not entirely clear from the record. Two mining claims are at issue in this case: the Gold Fork # 17 Association and the Gold Fork # 19 Association placer claims located in secs. 3 and 4, T. 27 N., R. 13 W., Fairbanks Meridian, west of the Koyukuk River, which is in turn west of the Dalton Highway along the Trans-Alaska pipeline. These mining claims are serialized in the record, respectively, as FF051635 and FF056137 (USGS Quadrangle Map attached to Nov. 23, 2003, letter from BLM to the Board.) The Cessation Order, however, identifies the Gold Fork # 17 Association claim as FF063387. (Cessation Order at 4.) The mining claims are located, respectively, along Twelvemile Creek and a tributary identified as its Lower Fork. (USGS Quadrangle Map attached to Nov. 23, 2003, letter from BLM to the Board.) The map indicates that the two claims converge in a perpendicular pattern at the conjunction of the two creeks. It is at this conjunction on the Gold Fork # 17 Association claim that the relevant trailers and personal property are located.

It is not demonstrable from the record whether all appellants are owners of the mining claims. They assert that they conduct activities within the boundaries of both mining claims. Dan Solecki responded to a letter served on all mining claimants by the Alaska State Office in 1996, indicating that one or more of the appellants is a claim owner.

The record indicates that BLM opened Surface Management File FF090742 for operations along Twelvemile Creek, after receiving a notice of operations on August 2, 1993. (Cessation Order at 1-2.) According to the Cessation Order, the notice of operations proposed hand mining, sluicing, and the use of an eight-inch suction dredge. Nothing from this case file appears in the record; it is not possible to review the notice of operations or to determine who filed it. BLM asserts that, to the best of its knowledge, this file was closed on February 18, 1998, “[a]pparently because the level of surface disturbing activities consisted of low impact testing and casual use.” *Id.* at 1-2.

On August 15, 1996, after BLM promulgated the rules at 43 CFR Subpart 3715, the Alaska State Office prepared and sent all mining claimants, for their response, an Existing Occupancy Notification form, and required them to return it by October 15, 1996. (Aug. 15, 1996, Letter from BLM to Solecki at 1.) According to the form, “BLM will use this information and information gathered in follow-up inspections to determine if occupancy is reasonably incident as described in 43 CFR 3715.” *Id.*, attached Existing Occupancy Notification Form.

BLM created Use and Occupancy File FF092132 for the Twelvemile Creek location after Solecki submitted this form on August 22, 1996. On this form, Solecki represented the “occupancy’s” location as the SE $\frac{1}{4}$ sec. 4, T. 27 N., R. 13 W., Fairbanks Meridian, Alaska, along “12 mile cr.” Solecki indicated that he did not have a “properly filed Notice or an approved Plan of Operations,” but that the “[o]ccupancy was part of a reasonably incidental activity that does not require a Notice or a Plan.” (Aug. 22, 1996, Solecki Existing Occupancy Notification at 1.)

On April 15, 1997, the Northern District Office sent Solecki a letter acknowledging receipt of his Existing Occupation Notification. BLM included a copy of its use and occupancy regulations with the letter. BLM also requested that Solecki provide the information required by 43 CFR 3715.3-2, regarding occupancy, so that processing could proceed. (Apr. 15, 1997, Occupancy Acknowledgment at 1-2.)

GRA responded to this request as “owner” by filing a Use and Occupancy Worksheet with BLM on August 14, 1997. GRA described its occupancy as consisting of two ATCO trailer units, each 50 feet long and 10 feet wide, and an outhouse. According to GRA, it purchased the units in 1988 from Larry Brown, who was apparently a previous mining operator on or near GRA’s mining claims. GRA explained that its occupancy is “reasonably incident” to mining because it provides housing and shelter from bears. GRA asserted that its “prospecting and hand mining during season,” occurring approximately from April through September, constitutes substantially regular work. GRA stated its belief that the “occupancy” would lead to extraction and beneficiation of minerals “[i]f main pay streak or lode is found (For Upper and Lower Fork Creeks): when a miner is found to lease and work the South

Fork of 12 Mile Creek.” According to GRA, the ATCO trailer units and outhouse constitute the necessary observable, on-the-ground “activity” required to meet the terms of 43 CFR 3715.2, and “wooden sluiceboxes” constitute the presently operable equipment. Finally, GRA indicated that the trailers and outhouse are justified both because they protect exposures of valuable minerals or concentrates from theft or loss and because the mining is “located in an isolated area where it is not practical for workers to work a usual and customary shift and to travel to and from a community where housing may be obtained.” (Occupancy Worksheet at 1-2.)

In describing the mining activity, GRA failed to identify a startup or mining operations period, but asserted that both were “ongoing.” Id. at 3. When BLM requested the claimants to identify a time when “shutdown, cleanup and removal of structures” would occur, GRA responded that it was “unable to determine at this time – as long as gold is found . . .” Id. They drew a map indicating the location of the ATCO units and outhouse as paralleling the “#7 trail to Gates of Arctic Park.” Id. In an attachment to the occupancy worksheet, GRA described its mining activities and use of the occupancy. The following is the entire recitation:

The group of mining claims for which these occupancy structures are used is at a remote site across the Middle Fork of the Koyukuk River from the Dalton Highway. The site is approximately two miles from the Koyukuk River following Twelvemile Creek and is at the confluence of Twelvemile Creek and Lower Fork Creek.

The occupancy houses the equipment needed for hand mining and prospecting and obviates the need to bring such equipment to the site each year. The occupancy also provides shelter for those working on the claim group as we systematically prospect said group [of claims] for minerals.

The occupancy is roughly 1/4 miles from exposed bedrock on Lower Fork Creek, 5/8 miles upstream from the Canyon on Twelvemile Creek, 1 mile from a claim on the South Fork of Twelvemile Creek, and two miles from our claim group upstream from the Miscovich claim group on Twelvemile Creek. The occupancy provides a central location from which to perform regular seasonal work on these claims.

Work at this time is primarily prospecting and hand mining with occasional use of a small suction dredge. While the dredge is floated across the river and towed upstream to the occupancy each year, the tools for the repair and operation of the dredge and the sluice boxes and other hand-mining equipment are kept at the occupancy. Tools

include [p]icks[,] shovels, saws, [and] hammers. Fuel other than propane for cooking is not kept at the occupancy.

(Occupancy Worksheet at Attachment 1.)

BLM asserts that it first inspected GRA's occupancy site in the Spring of 1999. This inspection was conducted to familiarize BLM with the area in preparation for future compliance inspections. (Cessation Order at 2.) BLM subsequently conducted a compliance inspection on July 28, 1999. A Compliance Inspection Sheet associated with this inspection noted that GRA's mining methods are "N/A - site had been recently visited - cut brush, footprints, new cans," and that the "[l]evel of operations does not warrant structures on site." (July 28, 1999, Compliance Inspection at 1 (emphasis added).) Photographs taken during that inspection show that one of the ATCO Units had missing and boarded doors. BLM recommended: "Prior to September 30, 1999 provide a schedule for site clean up and removal of ATCO Units." Id. at 1.

In an August 13, 1999, letter to Solecki transmitting the Compliance Sheet and inspection photographs, BLM inquired as to his plans for removing the ATCO trailer units. On September 27, 1999, Solecki replied to BLM stating that he had conducted "conversations with two different miners regarding leasing and mining my ground" for 2000 or 2001. He also noted that he was planning to retire in 2000 and that he "[has] had plans for fall/winter or winter/spring prospecting" on Twelvemile Creek. (Sept. 21, 1999, letter from Solecki to BLM.) He noted that "the worst case scenario" would involve burning the camp and burying the debris using a caterpillar tractor. In the 1990s, he stated, trash and materials left by another party were burned and buried on the site. Solecki questioned the dates of the July 28, 1999, inspection photos and inquired as to whether he could download the occupancy regulations. Id. The Northern Field Office responded by letter dated November 12, 1999. BLM attached two IBLA decisions, Firestone Mining Industries, Inc., 150 IBLA 104 (1999), and Mike and Sandra Sprunger, 150 IBLA 64 (1999), because they "provide a general idea as to the intent of 43 CFR 3715." (Nov. 12, 1999, letter from BLM to Solecki.)

The next summer, in a letter dated June 26, 2000, Solecki, on behalf of GRA, objected to the BLM "ruling" that its occupancy of the Twelve Mile Creek site was unjustified. Solecki asserted that GRA's "29 year track record of being on our claim, hand mining, is unmatched," and goes beyond mere casual use. Solecki asserted that the trailers serve as shelter to protect GRA from bears, referencing several bear encounters to illustrate this point. He added that because emergency air transportation is no longer available in the area, the trailer units serve as a necessary source of protection. Solecki requested a meeting with BLM to discuss the occupancy issue. (June 26, 2000, Letter from Solecki to BLM at 1-2.)

BLM wrote Solecki on July 11, 2000, and informed him that it had not issued a “decision, order, or ruling” with regard to the GRA occupancy. In response to Solecki’s request for a meeting, BLM suggested several potential dates. BLM stated that it would be conducting compliance examinations in September and October. Attached to this letter was another IBLA decision on the occupancy issue, Bradshaw Industries, 152 IBLA 57 (2000). (July 11, 2000, Letter from BLM to Solecki at 1-2.)

BLM prepared a “memo” dated September 28, 2000, apparently to document a field inspection. The memo states in its entirety: “Unchanged from prior examinations. No evidence of any use other than what the owner(s) have stated in the past.” (Sept. 28, 2000, Memo, Surface Management File FF092132.)

After reviewing Surface Management File FF090742 and Use and Occupancy File FF092132, BLM issued the Occupancy Non-Concurrence and Permanent Cessation Order to Solecki, Teel, and Cook on March 28, 2001. For purposes of the Order BLM accepted GRA’s rendition of its mining activities. BLM concluded:

Because the documentation summarized above indicates that you are not conducting mining operations which would be regulated as anything other than Casual Use as defined under 43 CFR 3809.5, that you cannot in any reasonable manner meet [the elements of 43 CFR 3715.2], or that your level of activity can meet the standard identified under 43 CFR 3715.5(d), you are hereby directed to take the following actions:

Within 30 days of your receipt of this notice, you must provide BLM with a schedule for the removal of your two ATCO units and other personal property located on federal mining claim FF063387 (Gold Fork # 17 Association). The deadline for completion of this work is April 1, 2002.

(Cessation Order at 3-4.) BLM added that the “presently accepted occupancy standard for casual use/exploration/testing programs is tent structures, ‘Weatherport’ structures, and tarp-type lean-tos.” Id. at 4-5. It also suggested that “[p]roper food storage techniques and solar panel powered electric fences have been shown to be effective bear deterrents.” Id. at 5.

On April 27, 2001, Solecki and Teel, and Cook and Teel filed with BLM separate notices of appeal from the March 28, 2001, Cessation Order. The appeal submitted by Solecki and Teel was docketed as IBLA 2001-258; the appeal submitted by Cook and Teel was docketed as 2001-259. In separate statements of reasons (SORs) submitted by Solecki and Teel on May 21, 2001, and by Cook on May 29, 2001, appellants argue that the BLM decision will expose GRA to physical dangers in

the form of dramatic temperature shifts, flash floods, and bear attacks, all hazards in the Twelvemile Creek area. They assert that, when the ATCO trailers became available for purchase around 1986, BLM informed GRA that use of the trailers was acceptable based on their mining practices and that disposal could be accomplished through “burning and burial.” Removing the trailers from their claim, they state, will cost an estimated \$20,000. As GRA spends only about \$1,000 annually, Solecki and Teel argue that removing the ATCO trailer units would be financially “devastating.” In regards to BLM’s finding that GRA is conducting casual use at its Twelvemile Creek site, they respond:

How casual are we? We drive about 365 miles over rough gravel roads from one resident’s home to our parking lot/staging area. We pack our food and gear more than a mile to the river. After finding a crossing point, we either carry or float the supplies across the river. Next we carry and float the supplies about two miles up a creek until we reach our trailers. Then we use picks, shovels, pans, metal detectors and sometimes a small suction dredge to prospect frozen ground. We have done this for 20 years.

(Solecki and Teel SOR at 3.) Solecki and Teel request that GRA be allowed to continue its occupancy. In the alternative, they request permission to “burn and bury” the trailers. Id. at 1-3.

In a separately filed SOR, Cook concurs in the SOR submitted by Solecki and Teel. He adds that the closest non-Federal land to the GRA claims is located in Wiseman, approximately 18 miles away, and avers that GRA’s attempts to contact the owners of that property have been unsuccessful. Cook asserts that removing the ATCO trailer units from the site may require hauling them over 200 miles to the Fairbanks area. Had GRA known that it would not be able to “burn and bury” the ATCO units, he states, it would not have purchased the trailers. (Cook SOR at 1.)

In an Answer submitted July 19, 2001, BLM contends that BLM inspectors found no evidence of mining activity and that “at most, the Appellants are merely conducting casual use mining.” (Answer at 3.) Because of this, and because “they cannot meet any of the use and occupancy requirements of 43 C.F.R. § 3710 et seq.,” BLM served the Cessation Order.^{1/} According to BLM, use of two large trailers in an area with only light mining activity constitutes undue degradation of Federal lands. (Answer at 5-6.) BLM asserts that GRA’s justification for the use of the ATCO trailers is insufficient. According to BLM, other miners in the area run operations without trailers and protect themselves from bears through proper food storage. As to the

^{1/} BLM regulations at 43 CFR Subparts 3710 through 3714 also contain rules implementing the Surface Resources Act.

cost of moving the trailers, BLM states that other miners in the area have removed trailers for only a few thousand dollars which, BLM asserts, is approximately the same as burning and burying the trailers. (Answer at 6-7.) Finally, BLM argues that GRA's use of the mining area does not justify its level of occupancy. "[T]here is no on-the-ground observable evidence that Appellants' placement of trailers on the site is reasonably incident to on-site prospecting, mining, or processing operations, or even that they are making an active effort to pursue such operations." For this reason, BLM concludes that GRA cannot meet the occupancy standards under 43 CFR 3715.2. (Answer at 7-9.) With its answer, BLM attaches a July 12, 2001, declaration of Keith Woodworth, Natural Resource Specialist, BLM. Woodworth asserted that there is no evidence in GRA's files to support or disprove the claim that BLM approved burning and burial as a disposal method for the trailer units. He also declared that he knew a miner in the area who had "similar structures" removed for between \$3,000 and \$3,500. Finally, Woodworth suggests that solar powered electric fences have proven to be an effective bear deterrent throughout North America. (Woodworth Declaration at 1.)

In 2003, Woodworth completed and submitted another Compliance Inspection. This inspection revealed "[m]inor hand mining above camp. Lots of evidence of camp use - well defined foot trails around structures but only little evidence of activity away from camp." (Aug. 4, 2003, Compliance Inspection at 1.) Woodworth prepared for purposes of this appeal a 2003 Compliance Summary incorporating information from the 2003 inspection plus other background information. BLM again found that GRA's mining activities were casual use. (2003 Compliance Summary at 2.) The 2003 Compliance Summary also provided supplemental information on GRA's mining site and access to the area.

From the Dalton Highway, access to the ATCO units is accomplished over a gated [Alaska] Pipeline gravel access road to a pullout area. From this point, four wheelers are used to cross a small (deep) drainage channel to an old material site access road. This overgrown road (trail) is suitable for four wheeler travel. From this trail, access continues over large gravel bars along the left limit of the South Fork of the Koyukuk River. From the gravel bar area, access is variable and dependent on resources available. *

This year, it was obvious that the owners and apparently several other people (based on the amount of four wheeler traffic) moved gear to the river and then ferried it across. On the other side, the owners flagged a foot trail to an old overgrown cat trail. * * *

* * * * *

The owners have generally accessed the claims by foot from the right limit of the Middle Fork to their camp. It is known that at least once they used an inflatable raft which was lined through shallow areas part way up Twelvemile Creek. From there, they walked to the camp, approximately one to one and a half miles.

(2003 Compliance Summary at 1-2.) The 2003 Compliance summary also explains that the period when GRA purchased the trailers, about 1988, corresponds to the end of Brown's mining on the mining claim and/or adjacent claims. It notes that, when Brown's operation ended and reclamation of the site was concluded, the equipment capable of moving the ATCO trailer units was transported out of the area. Id. at 2.

We affirm the Cessation Order in this case only to the extent it concludes that the occupancy is not justified. However, some untangling of BLM's reasoning and remedies is necessary to reach that conclusion. BLM is correct to conclude that appellants have not demonstrated that their activities on the mining claims at issue meet the standards required by 43 CFR 3715.2. However, BLM's inspections and findings, and in particular its logic with respect to whether there are activities taking place that are compliant with that rule or, alternatively, casual use, require analysis.

A Cessation Order must meet the standards under 43 CFR 3715.7-1(b). A Cessation Order is properly issued where "all or any part of a use or occupancy is not reasonably incident but does not endanger health, safety, or the environment." 43 CFR 3715.7-1(b)(1)(i). The Order, however, must describe "[t]he ways in which your use or occupancy is not reasonably incident." 43 CFR 3715.7-1(b)(2)(i). BLM must also ensure generally that its decisions are supported by a reasoned analysis of the facts in the record. Thomas E. Swenson, 156 IBLA 299, 310 (2002); Franklyn Dorhofer, 155 IBLA 51, 54 (2001).

The Cessation Order asserts, at page 2, that there is little evidence of mining, and notes that appellants had explained their intentions to lease the site to others willing to mine there. BLM concludes that the "structures are used in a hand-mining operation associated with the performance of annual assessment work." These findings, if accurate, would be sufficient to justify BLM's assertions that the activities performed by appellants do not meet the standards of 43 CFR 3715.2, a necessary predicate to any occupancy.

Nonetheless, the order proceeds to categorize GRA's use as "casual use" and rejects the occupancy on the ground that casual use itself cannot meet the standards of 43 CFR 3715.2. (Cessation Order at 1-3.) It states:

The information in the case files shows that your level of activity under the mining law and BLM 3809 regulations is clearly *Casual Use*. No

disagreement with your stated level of activity is taken by this Order. * *

* [T]he documentation summarized above indicates that you are not conducting mining operations which would be regulated as anything other than Casual Use as defined under 43 CFR 3809.5, that you cannot in any reasonable manner meet the above 5 elements [of 43 CFR 3715.2], or that your level of activity can meet the standard identified under 43 CFR 3715.5(d) * * *.

(Cessation Order at 3 (emphasis added).) Thus, even though BLM appears to believe that GRA is not conducting mining activities other than assessment work, the emphasized language makes clear that BLM chose to give GRA the benefit of the doubt by conceding that mining to the extent of casual use was occurring just as GRA had described it.

BLM's decision, despite its own findings to the contrary (Sept. 28, 2000, Compliance Inspection at 1; Cessation Order at 3), to accept GRA's "stated level of activity," created two difficulties for this Board in reviewing the Cessation Order. First, inconsistencies between the facts uncovered during BLM's investigations, its argument on appeal, and its classification of GRA's mining activities as casual use undermine any argument that BLM made the reasoned analysis required of it. GRA initially described its mining activities to BLM as involving prospecting, hand mining, and intermittent use of a suction dredge. (Occupancy Worksheet at Attachment 1.) BLM's findings during two inspections in 1999 and 2000 revealed, little, if any, evidence of these alleged activities. (July 28, 1999, Compliance Inspection at 1; Sept. 28, 2000, Compliance Inspection at 1.) On appeal, BLM argues that "there is no on-the-ground observable evidence" in support of appellants' contentions regarding their alleged use. (Answer at 8.) Instead of explaining what it believed was the reason for noncompliance, BLM accepted and labeled as casual use facts alleged by the mining claimants but unsupported by the record.

[1] Second, the Subpart 3715 rules demonstrate that BLM may not, as it tried to do here, conclude that casual use mining makes occupancy impermissible. Casual use mining includes activities resulting in little or no disturbance to public lands, including, among other things, rock or soil collection using hand tools, non-motorized sluicing, portable suction dredges, and metal detectors. 43 CFR 3809.0-5 (2000); see also 43 CFR 3809.5 (2003). The import of that definition, at least for purposes here, is that the miner is not required to obtain approval of or to notify BLM of casual use operations, and certain of such operations do not require a plan of operations. 43 CFR 3809.1-2 (2000) and 3809.1-4 (2000).

No rule at Subpart 3715, however, equates casual use with uses that are not reasonably incident, or uses that do not meet any of the other standards of

43 CFR 3715.2. Rather, reasonably incident activities include activities to “explore [for] * * * a valuable mineral deposit.” 43 CFR 3715.0-5. Moreover, the Subpart 3715 rules clearly anticipated occupancies in association with casual use mining. We addressed this point in Thomas E. Swenson, 156 IBLA at 308-09.

* * * Table 2 in 43 CFR 3715.3, expressly acknowledges that BLM will consider a proposed occupancy based on “casual use.” It states: “If you are proposing a use that would involve occupancy * * * [a]nd is a ‘casual use’ under 43 CFR Subpart 3809.1-2 or does not require a plan of operations under 43 CFR 3802.1-2 and Subpart 3809.1-4 or a notice under 43 CFR Subpart 3809.1-3, * * * [y]ou are subject to the consultation provisions of this subpart and must submit the materials required by 3715.3-2 to BLM.” The Preamble to 43 CFR 3715.3 likewise acknowledges that casual use may involve an occupancy: “This section of the final rule is organized as a table that lists the requirements you must follow to consult with BLM regarding a proposed occupancy before occupancy may begin in connection with * * * casual use activities.” 61 FR 37121 (July 16, 1996). Likewise, this Board expressly acknowledged the ability of a claimant to justify occupancy based on casual use in David J. Flaker, 147 IBLA 161, 165-66 (1999), when it vacated a notice of non-compliance and required adjudication under the Subpart 3715 rules.

Thus, BLM’s conclusion that because appellants’ activities are “casual use” operations, they cannot comply with 43 CFR 3715.2, is simply not sustained by Subpart 3715.^{2/}

Nor can we affirm BLM’s application of 43 CFR 3715.5(d) to GRA’s occupancy on this record. That rule states: “If your prospecting or exploration activities involve only surface activities, you must not place permanent structures on the public lands.”

^{2/} We note that 43 CFR 3809.5(2) (2003) states that “casual use does not include ‘occupancy’ as defined in [43 CFR] 3715.0-5. This statement makes clear that “casual use” is a description of mining associated activity, not a description of non-mining use of the public lands (occupancy) that may be permitted when reasonably incident to such mining activities. 43 CFR 3715.0-5. 43 CFR 3809.5(2) (2003) merely reinforces that casual use refers to mining use and does not include non-mining use (occupancy); it does not suggest that the “occupancy” cannot occur in association with casual use mining activities. Rather that issue is governed by 43 CFR 3715.3, Table 2. Likewise, GRA is wrong to assert that the remote location of its mining claims and its difficulty in accessing them has any bearing on whether its mining-related activities constitute or go beyond casual use. The degree of effort put forth by miners in reaching the mining claims is irrelevant to whether or not their mining activities at the site constitute casual use.

The rule does not address casual use. Rather it divides exploration or prospecting uses into surface and subsurface activities, with only the latter permitting permanent occupancies. The difficulty in attempting to square the rules and definitions within Subpart 3715 is that 43 CFR 3715.0-5 does not define temporary occupancy, other than to exclude a tent or lean-to from the definition of “permanent structures.” Similarly, 43 CFR 3715.2 does not divide reasonably incident uses, to the extent they are for prospecting or exploration, into surface or subsurface uses. If a claimant’s prospecting or exploration uses meet the standards of 43 CFR 3715.2, then, it would appear that BLM’s limitation within 43 CFR 3715.5(d) would nonetheless permit only temporary structures for surface exploration, even where a claimant’s occupancy meets the standards of 43 CFR 3715.2-1 for protection of equipment or human health. It is not entirely clear whether such a decision would meet the test of reasonableness, if a tent was inadequate protection from theft or danger, when it was the risk of theft or danger that was the predicate for the occupancy in the first place. We need not address the many difficult questions that might arise on this record in attempting to square these rules, given that ^{3/}BLM never supported any finding that appellants’ uses were surface uses or casual uses.

[2] We conclude that the only approach to determining whether an occupancy as defined at 43 CFR 3715.0-5 is permitted, is to look at the rules governing exactly that question. These are 43 CFR 3715.2 and 3715.2-1. Whether or not a use is casual use, a miner’s activities must meet all the standards of the first rule and at least one standard of the second. BLM may not avoid its obligation to state in a Cessation Order why mining activities do not comply with 43 CFR 3715.2. Accepting a claimant’s version of its activities and labeling it as “casual use” cannot supplant the determination of the actual on-the-ground use necessary for such a Cessation Order.

While we think BLM’s Cessation Order incorrectly analyzed application of the Subpart 3715 rules, we nonetheless look at BLM’s logic within that Order to determine whether the order should be affirmed on grounds that GRA’s mining activities do not meet the standards set forth in the two critical rules.^{4/} To the extent GRA disputes BLM’s analysis, GRA bears the burden to prove that its occupancy on

^{3/} One of these ambiguities is BLM’s suggestion that “solar panel powered electric fences have been shown to be effective bear deterrents.” *Id.* at 5. Fences constitute occupancies under 43 CFR 3715.0-5. Presumably, BLM is concluding that a fence is a temporary structure, like a tent. Such interpretations are at best ambiguous considering the plain language of 43 CFR 3715.2, 3715.2-1, and 3715.5(d).

^{4/} The Board’s review authority is de novo in scope because it is our delegated responsibility to decide for the Department “as fully and finally as might the Secretary” appeals regarding use and disposition of the public lands and their resources. 43 CFR 4.1; Wyoming Outdoor Council, 160 IBLA 387, 397-98 (2004).

the Twelvemile Creek site is justified under the standards of both 43 CFR 3715.2 and 3715.2-1. Thomas E. Swenson, 156 IBLA at 310; David J. Flaker, 147 IBLA at 164.

Starting with the second rule first, we find that BLM's confusion over casual use operations infects its analysis of whether the GRA occupancy satisfies 43 CFR 3715.2-1(e). That rule permits an occupancy if activities meeting the standards of 43 CFR 3715.2 are "so isolated or lacking in physical access as to require * * * workers to remain on site in order to work a full shift * * *." 43 CFR 3715.2-1(e). GRA's occupancy site is located seven miles from Coldfoot, Alaska, and is approximately two and a half miles west of the Dalton Highway. From the road access point, appellants pack food and gear a mile to a river, carry or float the supplies across the river, then travel about two miles to the ATCO trailer units. (Solecki and Teel Notice of Appeal at 2.) BLM generally confirms this, as well as the difficulties that may be encountered when adverse winter weather affects the river's course in the spring. (2003 Compliance Summary at 1-2.) Based on the remoteness of GRA's site and the absence of evidence that alternative accommodations exist, daily travel to and from the site to other housing would be impracticable. Likewise, it is apparent that the standards in 43 CFR 3715.2-1(e) may be implicated by the contact with bears documented in the record.

An occupancy satisfies 43 CFR 3715.2-1 where it meets one of the standards in that rule. If activities in compliance with 43 CFR 3715.2 also meet any of these standards, an occupancy is justified. It is only by defining appellants' activities as casual use and outside the scope of 43 CFR 3715.2 that BLM avoided considering the occupancy's obvious compliance with 43 CFR 3715.2-1(e).

Such compliance, however, is irrelevant if GRA's mining activities do not satisfy every element of 43 CFR 3715.2. Considering the findings in BLM's Cessation Order and the record, we affirm the order to the extent BLM found that GRA's actual documented activities cannot meet the standards within that rule. First, mining activities used to justify an occupancy must be reasonably incident, 43 CFR 3715.2(a); this means they must involve "actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop [or] mine." 43 CFR 3715.0-5. The record reveals little, if any, evidence that GRA has conducted prospecting, exploring, or mine development activities. (July 28, 1999, Compliance Inspection at 1; Sept. 28, 2000, Compliance Inspection at 1; Aug. 4, 2003, Compliance Inspection at 1.) BLM inspection pictures contain no evidence of recent mining or exploration activity. Solecki's letters proffer plans for future mining, possibly by potential lessees. BLM concludes that the record shows that GRA has most likely been conducting annual assessment work. Though GRA has the burden to demonstrate the reasonably incident nature of its mining activities, appellants' SORs do not refute such a conclusion.

Second, to support an occupancy, mining activities must be “substantially regular.” 43 CFR 3715.2(b). “The term also includes a seasonal, but recurring, work program.” 43 CFR 3715.0-5. The preamble to the rulemaking states: “‘Substantially regular work’ * * * encompasses a seasonal, but recurring, work program. This provision does not prohibit weekend or intermittent mining activities. Such activities, if carried out in good faith, may warrant occupancy under certain circumstances.” 61 FR at 37120. Clearly, then, GRA’s mining activities are not precluded from being substantial and regular based on their seasonal nature alone.

Absent from the record, however, is evidence demonstrating that substantially regular mining has, in fact, occurred. BLM’s compliance investigations consistently noted the absence of mining activities, seasonal or otherwise. (July 28, 1999, Compliance Inspection at 1; Sept. 28, 2000, Compliance Inspection at 1; Aug. 4, 2003, Compliance Inspection at 1.) Though GRA describes mining activities, GRA points to no evidence that BLM could have inspected to substantiate the alleged activities. Cf., Thomas E. Swenson, 156 IBLA at 305, 310.^{5/} Thus, neither the record nor GRA demonstrates the existence of substantially regular work on the Twelvemile Creek site.

GRA also has the burden to demonstrate that its mining activity is reasonably calculated to lead to the extraction and beneficiation of minerals. 43 CFR 3715.2(c). The expectation of new or additional mining activities in the future is not relevant to this inquiry. See Bradshaw Industries, 152 IBLA at 63-64. Here, BLM uncovered no evidence that GRA has accomplished the extraction or beneficiation of minerals thus far. (July 28, 1999, Compliance Inspection at 1; Sept. 28, 2000, Compliance Inspection at 1; Aug. 4, 2003, Compliance Inspection at 1.) Nor does GRA demonstrate that its activities are calculated to lead to extraction of minerals. To the contrary, GRA asserts that the beneficiation of minerals will occur “[i]f main pay streak or lode is found (For Upper and Lower Fork Creeks) [and/or] when a miner is found to lease and work the South Fork of 12 Mile Creek.” (Occupancy Worksheet at 1.) GRA asserts it has been exploring the claims for 29 years paying approximately \$1,000 per year to do so. Such admissions lead to the inevitable conclusion that, at best, some or all of its members have been performing nothing but annual assessment work.

Likewise, the regulations require that mining to support an occupancy involve observable on-the-ground activity that BLM may verify. 43 CFR 3715.2(d). GRA asserted that observable, on-the-ground, activity consisted of the ATCO trailer units

^{5/} In contrast to the facts here, in Thomas E. Swenson we invalidated a BLM Cessation Order where the claimant “describes detailed mining activities which he is undertaking * * * and provides pictures of mined land, and sluice boxes and other mining tools,” and yet BLM refused to investigate the site. Id. at 305.

and outhouse. (Occupancy Worksheet at 2.) The trailers, however, are strictly evidence of a residential occupancy. These structures are not probative of the existence of mining activity conducted by GRA, which is the predicate to the occupancy to begin with. Though it is clear GRA representatives and guests reside on the site seasonally, corresponding evidence of mining activity is absent. Based on this same information, we find as well that GRA has not demonstrated its use of appropriate, presently operable equipment on the mining claims pursuant to 43 CFR 3715.2(e).

BLM may order a permanent cessation of any or all use or occupancy if that “use or occupancy is not reasonably incident but does not endanger health, safety or the environment.” 43 CFR 3715.7(b)(1)(i). Because we find that GRA has not justified its occupancy under the requirements of 43 CFR 3715.2, we affirm BLM’s Cessation Order as modified herein to reflect that the appellant’s mining activities were not in compliance with 43 CFR 3715.2. BLM’s conclusions accepting GRA’s contentions which would support a finding that GRA is engaged in casual use, however, would not alone suffice to support affirmance of the Cessation Order under 43 CFR 3715.2.

BLM’s mandate that GRA remove the ATCO units also proves troublesome. It is undisputed that GRA owns the ATCO trailers in question, having purchased them from Brown between approximately 1986 and 1988. (Solecki and Teel Notice of Appeal at 2; 2003 Compliance Summary at 2.) GRA asserts that when the ATCO trailers became available for purchase in 1986, BLM informed it that use of the trailers was acceptable based on their mining practices and that disposal could be accomplished through “burning and burial.” (Solecki and Teel SOR at 2; Cook SOR at 1.) Although BLM does not confirm this communication, the assertion serves as an admission by GRA that it accepted and understood its responsibility for disposal of the ATCO units. (Woodworth Declaration at 1.) In fact, GRA continues to express a willingness to dispose of the trailers, if necessary. (Solecki and Teel SOR at 3.) Despite GRA’s clear responsibility for the ATCO trailer units, we cannot affirm BLM’s directive that those units be removed from the Twelvemile Creek site on this record.

Questions concerning the reasonableness and practicability of removal are raised in the record and the pleadings of both parties. GRA asserts that removing the trailers from the claim will cost an estimated \$20,000. (Solecki and Teel SOR at 2.) Woodworth stated in his declaration that he is aware of an area miner who had “similar structures” removed for between \$3,000 and \$3,500. (Woodworth Declaration at 1.) BLM’s counsel asserts to the Board, without citation or support, that the cost of removal would be about the same as the cost of burning and burying the trailers. (Answer at 6-7.) Yet, in its 2003 Compliance Summary, Woodworth contradicted his own earlier estimate by noting that all locally available equipment capable of moving the ATCO trailer units was removed from the area in about 1988,

apparently when Brown closed his mining operations. (2003 Compliance Summary at 2.) It is not clear whether Woodworth meant to repudiate his prior declaration, but these conflicting accounts raise significant questions about the reasonableness of the remedy, and whether BLM would support it at this juncture.

We also note an ambiguity regarding BLM's authority to order the removal of the ATCO trailer units. The rule at 43 CFR 3715.5-1 establishes that, at the end of an occupancy, BLM may order a claimant to remove property "placed on the public lands during authorized use and occupancy." Additionally, "any property you leave on the public lands" becomes property of the United States and the United States may charge "you" for the cost of removing and disposing of that property. 43 CFR 3715.5-2. Last year, the Board discussed the difficulties in interpreting these provisions.

The preamble to the final rule pertaining to use and occupancy under the mining laws indicates that the proposed rule was recast in "plain English," which, according to the preamble, is a "specific writing technique that communicates the information and legal requirements of regulations * * * through the use of question-and-answer headings, [and] active voice," among other things. 61 FR 37116, 37117 (July 16, 1996). The final rule adopts a conversational tone written in first and second person that includes broad use of the personal pronouns "I," "my," "you," and, occasionally, "your," all "intended to increase the clarity and understandability of the rule," and "any substantive changes that BLM * * * made in the final rule [were] fully described in the following discussion," meaning the preamble to the final rule. 61 FR 37117. The preamble states that 43 CFR 3715.5-1 and 5-2 were adopted from the proposed rule as the final rule "with minor editorial changes." BLM therefore intended the language in the final rule to remain substantively consistent with the proposed language.

The relevant language from the proposed rule is found at section 3715.4(f) and 4(f)(2), as follows:

(f) Unless expressly allowed in writing to remain on the public lands by the authorized officer, all permanent structures, temporary structures, material, equipment, or other personal property placed on the public lands during the use or occupancy covered by this subpart shall be removed * * *.

* * * (2) Any such property left on the public lands * * * shall become the property of the United States and shall be subject to removal and disposition by the authorized officer * * *. The

owner of any such property removed and disposed of * * * shall be liable for the costs incurred by the Government in such removal and disposal.

(57 FR 41850 (Sept. 11, 1992).

* * * * *

The language of final rule 3715.5-1 clearly refers to property placed on the land by the occupant during his or her operations, and final rule 3715.5-2 equally clearly refers to property left by the occupant during his or her occupancy.

James R. McColl, 159 IBLA 167, 180-81 (2003).

It follows that 43 CFR 3715.5-1 provides BLM with the authority to demand a miner to remove property from an occupancy if that miner was responsible for placing the property in question on the land. This interpretation is consistent with 43 CFR 3809.10(a), which states that miners need not inform BLM of their casual use, although “[y]ou must reclaim any casual-use disturbance that you create.” The Board addressed the removal issue in Karen V. Clausen, 161 IBLA at 179, as well as in James R. McColl, 159 IBLA at 180-82. In both instances, the Board declined to apply 43 CFR 3715.5-1 and 3715.5-2 to situations where the appellant occupied buildings left by a predecessor. Although these decisions did not present the situation where, as here, the claimant concedes that it purchased and owns title to the structures forming the occupancy, we again decline to read new language into these provisions. As in James R. McColl and Karen V. Clausen, we express concern that Subpart 3715 does not, and BLM has not sufficiently considered how it construes the rules to, adequately cover the situation where a claimant occupies buildings left by a predecessor.^{6/}

^{6/} We note that 43 CFR 3715.5(d) raises the same questions. This rule addresses the appropriateness of bringing permanent and temporary structures onto an occupancy during the prospecting and exploration stage of mining.

“If your prospecting or exploration activities involve only surface activities, you must not place permanent structures on the public lands. Any temporary structures you place on the public lands during prospecting or exploration will be allowed only for the duration of the activities, unless BLM expressly and in writing allows them to remain longer. If your prospecting or exploration activities involve subsurface activities, you may place permanent structures on the public lands, if BLM concurs.”

43 CFR 3715.5(d). The pronouns make it impossible to apply it directly to a situation where a miner obtains property placed on the site in years past.

Considering all of these concerns, we set aside BLM's Cessation Order, in part, to the extent it proposed a remedy, and remand the matter to BLM for further consideration and explanation consistent with the rules at 43 CFR Subpart 3715.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed as modified in part and is set aside and remanded in part for action consistent herewith.

Lisa Hemmer
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge